Supreme Court, U.S.
FILED
07-250 AUG 21 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

WILLIAM S. AHOLELEI,

Petitioner,

v.

STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY, JOHN PEYTON, FRANK LOPEZ, EDWIN SHIMODA, CLAYTON FRANK, RANDY ASHER, ERIC TANAKA, GARY KAPLAN, MAY ANDRADE, CINDA SANDIN, STATE OF HAWAII ATTORNEY GENERAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL W. CANE, JR.
PETER C. MEIER
SEAN D. UNGER*
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105-3441
(415) 856-7000

* *Counsel of Record*

Attorneys for Petitioner

CP

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State civil defendant waives its Eleventh Amendment immunity by commencing a third-party claim within the action.

2. Whether a State civil defendant waives its Eleventh Amendment immunity by making a general appearance in the action.

PARTIES TO THE PROCEEDING

William Aholelei was plaintiff in the United States District Court for the District of Hawaii and is petitioner here. Defendants and respondents are the Department of Public Safety, State of Hawaii ("DPS"); the Attorney General for the State of Hawaii; John F. Peyton, the Director of DPS; Frank Lopez, the Acting Deputy Director of DPS; Edwin Shimoda, an Institutions Division Administrator at DPS; Clayton Frank, the Warden at the Halawa Correctional Facility run by DPS; Randy Asher and Edwin Tanaka, Deputy Wardens at Halawa; May Andrade, Chief of Security at Halawa; and Cinda Sandin, Corrections Supervisor II at Halawa's Special Needs Facility. For purposes of convenience, Mr. Aholelei sometimes will refer to the respondents collectively as "defendants" or "State defendants."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
OPINIONS AND ORDERS ENTERED IN THE CASE	1
BASIS FOR JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION ...	6
I. THE NINTH CIRCUIT'S DECISION CREATES A THREE-WAY CIRCUIT CONFLICT BY HOLDING THAT A STATE DEFENDANT MAY FILE AN OPTIONAL THIRD-PARTY COMPLAINT WITHOUT WAIVING ELEVENTH AMENDMENT IMMUNITY	7

Contents

Page

II. THE NINTH CIRCUIT'S DECISION EXACERBATES INTERCIRCUIT DISAGREEMENT OVER WHETHER A STATE DEFENDANT'S GENERAL APPEARANCE WAIVES ELEVENTH AMENDMENT IMMUNITY 12

A. This Court Itself Has Vacillated on Whether a General Appearance Waives Eleventh Amendment Immunity 13

B. Five Circuits (Including the Ninth, in Another Case) Hold a State Defendant's General Appearance Waives Immunity; Five Circuits (Including the Ninth Here) Hold the Opposite 14

CONCLUSION 16

Contents

Page

Appendix A — Opinion of The United States Court of Appeals for the Ninth Circuit Filed May 25, 2007 ..... 1a

Appendix B — Memorandum of The United States Court of Appeals for the Ninth Circuit Filed February 14, 2007 ..... 10a

Appendix C — Order Granting Defendants' and Third-Party Plaintiffs' Motion for Summary Judgment of The United States District Court for the District of Hawaii Filed December 6, 2005 ..... 15a

Appendix D — Order Granting Defendants' Motion for Leave To File Third-Party Complaint; Denying Plaintiff's Motion for Copies of The United States District Court for the District of Hawaii Filed September 15, 2005 ..... 34a

TABLE OF CITED AUTHORITIES

Page

CASES

Aerojet-General Corp. v. Askew,
453 F.2d 819 (5th Cir. 1971) 15

City of Clarksdale
v. BellSouth Telecommunications, Inc.,
428 F.3d 206 (5th Cir. 2005) 12

Clark v. Barnard,
108 U.S. 436 (1883) 13

College Savings Bank
v. Florida Prepaid Postsecondary Education Expense Board,
527 U.S. 666 (1999) 7, 9

College Savings Bank
v. Florida Prepaid Postsecondary Education Expense Board,
131 F.3d 353 (3d Cir. 1997) 13, 15

Constantine v. Rectors & Visitors of George Mason University,
411 F.3d 474 (4th Cir. 2005) 14

Continental Bank, N.A. v. Meyer,
10 F.3d 1293 (7th Cir. 1993) 12

Cited Authorities

Page

Datskow v. Teledyne, Inc., Continental Products Division,
899 F.2d 1298 (2d Cir.1990) 12

Edelman v. Jordan,
415 U.S. 651 (1974) 13

Fifth Third Bank ex rel. Trust Officer v. CSX Corp.,
415 F.3d 741 (7th Cir. 2005) 14

Ford Motor Co. v. Department of Treasury of Indiana,
323 U.S. 459 (1945) 13

Freeman v. Bee Machine Co.,
319 U.S. 448 (1943) 10

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,
545 U.S. 308 (2005) 15

Gunter v. Atlantic Coast Line Railroad Co.,
200 U.S. 273 (1906) 13

Hankins v. Finnel,
964 F.2d 853 (8th Cir. 1992) 8

Hartford Accident & Indemnity Co. v. Sullivan,
846 F.2d 377 (7th Cir. 1988) 10

Cited Authorities

Page

Hill v. Blind Industries & Services of Maryland,
179 F.3d 754 (9th Cir. 1999) 8, 14

Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.,
11 F.3d 399 (3d Cir. 1993) 10

Lapides v. Board of Regents,
535 U.S. 613 (2002) ..... *passim*

Leonardi v. Chase National Bank of City of New York,
81 F.2d 19 (2d Cir. 1936) 12

Mascheroni v. Board of Regents of the University of California,
28 F.3d 1554 (10th Cir. 1994) 15

Merchants Heat & Light Co. v. James B. Clow & Sons,
204 U.S. 286 (1907) 10

Mescalero Apache Tribe v. New Mexico,
131 F.3d 1379 (10th Cir. 1997) 9

Neinast v. Texas,
217 F.3d 275 (5th Cir. 2000) 8

Newfield House, Inc. v. Massachusetts Department of Public Welfare,
651 F.2d 32 (1st Cir. 1981) 8, 13, 14

Cited Authorities

Page

Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Authority,
744 F.2d 880 (1st Cir. 1984) 6, 7, 8, 9, 11

Petty v. Tennessee-Missouri Bridge Commission,
359 U.S. 275 (1959) 13

Regents of University of New Mexico v. Knight,
321 F.3d 1111 (Fed. Cir. 2003) 14

Settles v. U.S. Parole Commission,
429 F.3d 1098 (D.C. Cir. 2005) 14

Skelton v. Henry,
390 F.3d 614 (8th Cir. 2004) 6, 8, 9

State Contracting & Engineering Corp. v. Florida,
258 F.3d 1329 (Fed. Cir. 2001) 8-9

Stewart v. North Carolina,
393 F.3d 484 (4th Cir. 2005) 15

Union Electric Co. v. Missouri Department of Conservation,
366 F.3d 655 (8th Cir. 2004) 14

Wisconsin Department of Corrections v. Schacht,
524 U.S. 381 (1998) 12, 15

Cited Authorities

Page

CONSTITUTIONAL PROVISIONS

United States Constitution, amendment XI ..... *passim*

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1367 3

42 U.S.C. § 1983 ..... 3, 4

Haw. Rev. Stat. § 662-2 5

Haw. Rev. Stat. § 662-3 5

OTHER

Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, CIVIL PROCEDURE, § 6.9, Third-Party Practice (3d *ed.* 1999) 10-11

Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167 (2003) 15

Mr. Aholelei respectfully prays that a writ of *certiorari* issue to review a final judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS ENTERED IN THE CASE

The United States Court of Appeals for the Ninth Circuit issued two opinions in this case. The Ninth Circuit issued the first on February 14, 2007. The opinion was not published in the Official Reporter, but has been reported in the Federal Appendix at 220 Fed. App'x 670 (9th Cir. 2007) and is reprinted in Petitioner's Appendix ("Pet. App.") at 10a-14a.

Mr. Aholelei timely petitioned for rehearing on February 20, 2007, and the court granted rehearing on March 2, 2007. On May 25, 2007, the Ninth Circuit issued its second opinion, officially reported at 488 F.3d 1144 (9th Cir. 2007) and reproduced at Pet. App. 2a-9a. It is this second opinion that Mr. Aholelei asks this Court to review.

Two earlier decisions of the United States District Court for the District of Hawaii also are reprinted in Petitioner's Appendix. The first, a September 15, 2005, order granting the State defendants' motion to file a third-party complaint, is reprinted at Pet. App. 34a-43a. The second, a December 6, 2005, order granting the State defendants' motion for summary judgment, is reprinted at Pet. App. 15a-33a.

BASIS FOR JURISDICTION

Mr. Aholelei seeks review of the Ninth Circuit's decision entered May 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

STATEMENT OF THE CASE

1. The Halawa Correctional Facility, a prison run by the State of Hawaii, segregates into residential wards the members of known prison gangs. The stated purpose is to minimize contact between persons representing rival gangs.

2. Halawa does not, however, completely segregate gang and non-gang inmates. Where there are empty beds in a gang's ward, non-gang inmates are housed there as well. The effect of the policy has been to allow the concentrated gangs to dominate over commonly housed non-gang inmates. Gang rule prevails, and non-gang members are subject to violence as the empowered gangs exert their will.

3. Mr. Aholelei formerly was an inmate at Halawa. He is not a gang member. In early October 2003, Mr. Aholelei unknowingly broke a gang rule: He went to the front of the lunch line. He received his food before the inmates who were members of the United Samoan Organization, also known as the "USO Gang."

4. It is undisputed that the USO Gang then beat Mr. Aholelei within inches of his life, and he spent days slipping into and out of consciousness.

5. On July 9, 2004, Mr. Aholelei filed a *pro se* civil rights complaint against the State defendants, challenging the policy of amassing gangs in dedicated residential wards. Mr. Aholelei alleged that defendants' deliberate indifference to the risk posed by the concentrated USO Gang proximately caused the resulting attack. The suit cited the repeated and increased attacks by the USO Gang on non-gang inmates, and the State defendants' failure to respond. Mr. Aholelei asserted various Hawaiian tort-law claims and claims under 42 U.S.C. § 1983 against the State defendants in both their personal and official capacities. The United States District Court for the District Court of Hawaii had jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1367.

6. Defendants answered Mr. Aholelei's complaint on September 23, 2004, asserting sovereign immunity as an affirmative defense.

7. Thereafter, however, defendants did not immediately move to dismiss on the basis of sovereign immunity. Instead, defendants continued to litigate the case on the merits. For example, on June 7, 2005, three months after participating in a scheduling conference (held on February 8, 2005), and nearly six months after filing their answer, defendants filed a nine-page list of witnesses they intended to call at trial. The list included many of the defendants and numerous other individuals with knowledge of Mr. Aholelei's claims. Nowhere in the nine-page list did defendants note their sovereignty or their intent to assert Eleventh Amendment immunity.

8. Nearly two months later, and nearly a year after filing their answer, the State defendants moved for leave to file a third-party complaint against the USO Gang members the

State defendants claimed shared in (partially or wholly) the liability to Mr. Aholelei. Defendants based their motion on Rule 14 of the Federal Rules of Civil Procedure, seeking to implead the USO Gang members. Nowhere in defendants' notice of motion, their supporting memorandum of points and authorities, or in the proposed third-amended complaint, did defendants note their intent to assert Eleventh Amendment immunity. Instead, all defendants joined in the motion, and the State of Hawaii described itself as a "Defendant and Third-Party Plaintiff" in the first paragraph of the third-party complaint.

9. Resolving the contested motion, the District Court granted defendants leave to file their third-party complaint on September 15, 2005. Pet. App. at 34a. The District Court held that the defendants could not seek indemnification or contribution from third-parties under 42 U.S.C. § 1983, but could seek indemnification under Hawaiian law (which the State defendants had invoked). Pet. App. at 38a-42a. The State defendants filed their third-party complaint on September 23, 2005 – a year to the day after they filed their answer, and a year to the day since they had last (and first) asserted Eleventh Amendment immunity.

10. The following month, on October 10, 2005, defendants reasserted their immunity. They moved for summary judgment against Mr. Aholelei on the ground (among others) that they were immune from the jurisdiction of the District Court under the Eleventh Amendment. The District Court heard defendants' motion on December 5, 2006. The Court noted that immunity could be waived, but granted defendants' motion nonetheless. Pet. App. at 15a, 20a-23a.

11. Mr. Aholelei timely appealed. The United States Courts of Appeals for the Ninth Circuit appointed him *pro bono* counsel.

12. On February 14, 2007, the Ninth Circuit issued its first opinion, remanding Mr. Aholelei's claims against defendants in their personal capacities (including claims brought under section 1983), but affirming the District Court's dismissal of Mr. Aholelei's section 1983 claim against defendants in their official capacities. Pet. App. at 10a-13a. The Ninth Circuit's opinion, however, inadvertently overlooked Mr. Aholelei's state-law claims. (Hawaii has waived both its substantive immunity and jurisdictional immunity (in its own courts) for the torts of its employees. HAW. REV. STAT. §§ 662-2, 662-3.)

13. Mr. Aholelei petitioned for rehearing on the issue of the state-law claims. He consistently had argued that the State defendants had waived their Eleventh Amendment immunity by invoking the jurisdiction of the federal court through the third-party complaint, by their delay in seeking dismissal, and by their general appearance (effected, among other ways, by seeking leave to file the third-party complaint). Thus, while the Ninth Circuit had rejected Mr. Aholelei's section 1983 claims on the merits, the Ninth Circuit still had to resolve the State's waiver of Eleventh Amendment immunity to resolve the state-law claims. Mr. Aholelei had (and has) live claims, unless the Eleventh Amendment applies.

14. In its resulting second opinion, the Ninth Circuit considered but rejected Mr. Aholelei's contention that Eleventh Amendment immunity had been waived. Pet. App. at 2a-9a. In so doing, the Ninth Circuit rejected by name, as

unpersuasive, the First Circuit's holding in *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Authority*, 744 F.2d 880, 886 (1st Cir. 1984) (an opinion which then-Judge (now Justice) Breyer joined), that a State waives its immunity where it "not only appeared but filed a counterclaim and a third-party complaint. . . ." *See* Pet. App. at 5a. The Ninth Circuit instead invoked the Eighth Circuit's holding in *Skelton v. Henry*, 390 F.3d 614, 618 (8th Cir. 2004), "that [the filing of] a counterclaim and third party complaint are not sufficient to waive a claim of Eleventh Amendment immunity [when] asserted in the very same document" as defendant's answer. *See* Pet. App. at 6a-7a. Even though, here, Hawaii's third-party complaint was *not* asserted in, or at the time of, Hawaii's answer, the Ninth Circuit held that the State had not waived immunity.

REASONS FOR GRANTING THE PETITION

This petition presents two important constitutional questions, over which the courts of appeals disagree. First, does the affirmative invocation of a federal court's jurisdiction, by filing an optional third-party complaint, waive a State defendant's Eleventh Amendment immunity? The Ninth Circuit says "no;" the First Circuit says "yes;" and the Eighth Circuit says "sometimes."

Second, does a State defendant's general appearance in federal court waive its Eleventh Amendment immunity? The D.C., Federal, First, Fourth, Seventh and, oddly, Ninth (before this case) Circuits say "yes;" the Third, Fifth, Eighth, Tenth and (now) Ninth Circuits say "no."

The ongoing conflicts require this Court's review. "[J]urisdictional rules should be clear." *Lapides v. Bd. of*

Regents, 535 U.S. 613, 621 (2002). Both litigants and the lower courts must know when (and if) a State defendant has waived its immunity. Granting Mr. Aholelei's petition will establish clear jurisdictional rules and eliminate confusion among the State defendants who so regularly need to decide whether – and when and how – to assert Eleventh Amendment immunity.

I. THE NINTH CIRCUIT'S DECISION CREATES A THREE-WAY CIRCUIT CONFLICT BY HOLDING THAT A STATE DEFENDANT MAY FILE AN OPTIONAL THIRD-PARTY COMPLAINT WITHOUT WAIVING ELEVENTH AMENDMENT IMMUNITY

For better than a century, this Court has applied "the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 n.3 (1999) (per Scalia, J.). Despite that clear rule, the courts of appeals disagree when an act qualifies as a "voluntary" invocation of federal-court jurisdiction. Specifically, the circuits have answered in different ways the question of whether the filing of a third-party complaint, or even a permissive counterclaim, "invokes" federal jurisdiction and thereby waives Eleventh Amendment immunity.

The circuit conflict is palpable. The First Circuit holds that a State defendant waives its Eleventh Amendment immunity where it "not only appear[s] but file[s] a counterclaim and a third-party complaint. . . ." *Paul N. Howard Co. v. P.R. Aqueduct Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984) (per Coffin, J., with whom Breyer and Bownes, JJ., joined).

The Eighth Circuit, by contrast, holds that "a counterclaim and third-party complaint are not sufficient to waive a claim of Eleventh Amendment immunity," at least so long as they are "asserted in the very same document," such as defendant's answer, where they also assert and thereby preserve immunity. *Skelton v. Henry*, 390 F.3d 614, 618 (8th Cir. 2004).

The Ninth Circuit now has taken a still-different approach, holding that a State defendant's filing of a third-party complaint does not waive immunity so long as the intent of the act can be characterized as subjectively "defensive" in nature. Pet. App. at 7a-9a. The Ninth Circuit expressly rejected the First Circuit's analysis. Pet. App. at 5a ("We do not find *Paul N. Howard* persuasive.").[1]

There is similar confusion over the assertion of counterclaims. The First and Federal Circuits note that a State may waive Eleventh Amendment immunity by filing a counterclaim. *Newfield House, Inc. v. Mass. Dep't of Pub. Welfare*, 651 F.2d 32, 36 n.3 (1st Cir. 1981); *State Contracting*

---

1. Other courts, by contrast, have cited *Paul N. Howard* as highly persuasive. *See, e.g., Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000) (citing *Paul N. Howard* for the proposition that "[c]ourts have found waiver in two general varieties of cases: where the state asserted claims of its own or evidenced an intent to defend the suit against it on the merits."); *Hankins v. Finnel*, 964 F.2d 853, 856 (8th Cir. 1992) (relying on *Paul N. Howard* to find waiver by litigation conduct). Indeed, even the Ninth Circuit has previously relied on *Paul N. Howard* as positive law. *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 759 (9th Cir. 1999) (citing *Paul N. Howard* as an example of when "the state's conduct during the litigation clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity").

& Eng'g Corp. v. Florida, 258 F.3d 1329, 1337 (Fed. Cir. 2001). The Tenth Circuit, by contrast, holds that the filing of a counterclaim does *not* waive immunity. *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 n.4 (10th Cir. 1997).

The conflict is not merely over the result; the circuits also disagree in their analytical approach. All courts start with the issue of whether the State "voluntarily" invoked federal jurisdiction. *E.g.*, *College Savings*, 527 U.S. at 681 n.3. The Ninth Circuit held here, however, that the "voluntariness" of a State defendant's conduct is informed by whether an ultimately "defensive" intent is at issue. Pet. App. at 7a ("The filing of a third-party complaint for indemnification or contribution can best be viewed as an appropriate defense strategy. . . ."); *see also Skelton*, 390 F.3d at 618 (construing a third-party complaint as a defensive strategy). The First Circuit, by contrast, focused on the *objective* nature of the act – the affirmative invocation of federal jurisdiction in the third-party complaint – not the State's *subjective* intent in invoking it. *See Paul N. Howard*, 744 F.2d at 886.

Lapides v. Board of Regents – this Court's most recent restatement of the voluntary-invocation doctrine – suggests that the First Circuit's objective test is right. In *Lapides*, this Court held that a lower court "must focus on the litigation act the State takes that creates the waiver," not the subjective motive of the defendant in taking that action. 535 U.S. at 620. "A benign motive . . . cannot make the critical difference . . . ," this Court explained. *Id.* The issue in *Lapides* was removal. The question was whether the State defendant was compelled to take the jurisdiction-invoking act – there, removing the case to federal court – or whether the act

involved a choice. *Id.* This Court held that a State defendant waives its immunity when it *chooses* to invoke the jurisdiction of the federal court, even when the act is done for a strategic defensive purpose. *See id.* at 623; *cf. Merchants Heat & Light Co. v. James B. Clow & Sons*, 204 U.S. 286, 289-90 (1907) (Holmes, J.) (a defendant who files a counterclaim seeking recoupment waives venue objections; such a defendant "assumes the position of an actor and must take the consequences. The right to [assert the counterclaim] . . . is merely a convenience that saves bringing another suit, not a necessity of the defense."; "[B]y setting up [a] counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it."); *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 454 (1943) (post-Discovery Act case reaffirming the rule in *Merchants Heat*).

Thus, motive is not the test. Choice is. The State of Hawaii made such a choice here, when it invoked a federal forum to implead the USO Gang members as third-party defendants. Hawaii's impleading was not compulsory. The State could have filed a separate state-court action seeking indemnity or contribution – so it unquestionably invoked the federal forum voluntarily. Thus, this was not a case involving compulsory joinder under Rule 19(b) of the Federal Rules of Civil Procedure. As Judge Posner explained, in "all events, impleader clearly is voluntary." *Hartford Accident & Indem. Co. v. Sullivan*, 846 F.2d 377, 382 (7th Cir. 1988). It is "just a convenience" afforded to a defendant to avoid filing a separate action. *Id.*; *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 (3d Cir. 1993) (indemnification may be sought in a separate action); Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, CIVIL PROCEDURE, § 6.9, Third-Party Practice (3d ed. 1999)

("[I]mpleader is entirely optional; the defendant may assert the claim against the third party in a completely separate action.").

In the First Circuit, that act constitutes waiver; in the Ninth Circuit it does not; and in the Eighth Circuit it depends on when, where, and how the third-party complaint is asserted. The First Circuit's rule is correct. Its approach in *Paul N. Howard* is faithful to the objective nature of the voluntary-invocation analysis. There, because the State defendant *chose* to file a third-party complaint, the First Circuit had "little trouble concluding that [the State Defendant] voluntarily submitted to the jurisdiction of the federal court, thereby waiving any Eleventh Amendment immunity. . . ." 744 F.2d at 886. By contrast, the Ninth Circuit here – by focusing on the State defendant's *intent* as opposed to the State defendant's *choice* – departed not only from the First Circuit's rule in *Paul N. Howard*, but also this Court's teaching in *Lapides*.

For present purposes, however, it matters not what the right rule should be, only that there should be a uniform rule. This Court should grant *certiorari* to resolve the conflict.

II. THE NINTH CIRCUIT'S DECISION EXACERBATES INTERCIRCUIT DISAGREEMENT OVER WHETHER A STATE DEFENDANT'S GENERAL APPEARANCE WAIVES ELEVENTH AMENDMENT IMMUNITY

The Ninth Circuit's error is confirmed by a wholly separate doctrine, about which there is even greater disagreement among the circuits. Specifically, the circuits disagree whether a State defendant's general appearance in federal court waives its Eleventh Amendment immunity. Here, the State defendants made a general appearance by filing a contested motion for leave to file the third-party complaint, and then by filing that complaint when the motion was granted.[2] The circuits disagree on the Eleventh Amendment consequences of that general appearance.

---

2. *E.g.*, *City of Clarksdale v. BellSouth Telecomms., Inc.*, 428 F.3d 206, 214 n.15 (5th Cir. 2005) ("A party makes a general appearance whenever it invokes the judgment of the court on any question other than jurisdiction.") (citations omitted); *Leonardi v. Chase Nat'l Bank of City of New York*, 81 F.2d 19, 20 (2d Cir. 1936) ("A general appearance is entered whenever the defendant invokes the judgment of the court in any way, on any question other than the court's jurisdiction without being compelled to do so by previous rulings of the court sustaining jurisdiction."); *see also Wisc. Dep't of Corrs. v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring) (suggesting the Court should modify its "Eleventh Amendment jurisprudence to make it more consistent with [the Court's] practice regarding [waivers of] personal jurisdiction."); *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (personal-jurisdiction objection held waived even though the defendant purported to preserve it in the answer; the defendant thereafter participated in litigation and filed motions); *Datskow v. Teledyne, Inc., Cont'l Products Div.*, 899 F.2d 1298, 1303 (2d Cir.1990) ("A delay in challenging personal jurisdiction by motion to dismiss has resulted in waiver, even where, as here, the defense was asserted in a timely answer. . . .").

A. This Court Itself Has Vacillated on Whether a General Appearance Waives Eleventh Amendment Immunity

The longstanding rule has been that a State defendant waives its immunity "by a general appearance in litigation in federal court." *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 276 (1959); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (general appearance waives immunity); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (a State defendant's "appearance in a court of the United States would be a voluntary submission to its jurisdiction").

In *Edelman v. Jordan*, 415 U.S. 651, 677 (1974), however, this Court held that Eleventh Amendment immunity may be raised for the first time on appeal. After *Edelman*, lower courts struggled to reconcile that case with this Court's earlier general-appearance authority. A number of courts held that *Edelman* permitted a State defendant's general appearance without waiver, *see, e.g., College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 131 F.3d 353, 365-66 (3d Cir. 1997) (relying on *Edelman* to hold that general appearance does not waive immunity), while others held that *Edelman* did not alter the traditional rule, *see, e.g., Newfield House, Inc. v. Massachusetts Department of Public Welfare*, 651 F.2d 32, 36 (1st Cir. 1981) (noting *Edelman*, but applying the rule that a general appearance constitutes waiver).

This Court sought to resolve the confusion in *Lapides*. The Court expressly reaffirmed *Clark* and *Gunter* and overruled *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945) – which *Edelman v. Jordan* relied upon – reiterating that "a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity." 535 U.S. at 619.

B. Five Circuits (Including the Ninth, in Another Case) Hold a State Defendant's General Appearance Waives Immunity; Five Circuits (Including the Ninth Here) Hold the Opposite

Before the Ninth Circuit's decision here, the decisions of the D.C., Federal, First, Fourth, Seventh and Ninth Circuits had held that a State defendant's general appearance in federal court waives its Eleventh Amendment immunity. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005) ("'sovereign immunity of a State is waived by appearance in a federal court'") (citation omitted); *Regents of Univ. of N.M. v. Knight*, 321 F.3d 1111, 1124 (Fed. Cir. 2003) ("a state waives its Eleventh Amendment immunity ... by voluntarily appearing in federal court"); *Newfield House*, 651 F.2d at 36 ("one long-accepted basis for [finding a waiver] is a general appearance in a federal proceeding"); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 481 (4th Cir. 2005) (noting *Lapides*, "the Court has consistently held that a State's voluntary appearance in federal court effects a waiver of Eleventh Amendment immunity"); *Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005) (holding that *Lapides* reconfirmed rule of waiver by general appearance); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d at 761 (noting and applying the rule of general appearance).

By contrast, the Third, Fifth, Eighth, Ninth and Tenth Circuits – including the instant case, and a decision from the Eighth Circuit both decided after *Lapides* – permit a general appearance without waiving immunity. Pet. App. at 8a-9a (noting *Lapides*, but silently permitting general appearance without waiver); *Union Elec. Co. v. Mo. Dep't of Conservation*, 366 F.3d 655, 660 (8th Cir. 2004) (despite *Lapides*, a defendant's

general appearance does not waive Eleventh Amendment immunity).[3]

Thus, *Lapides* has not been consistently applied by the lower courts. *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1217 (2003) ("The impact of *Lapides* has, however, been disputed. Lower courts are already in disagreement about how to read it."); *Stewart v. North Carolina*, 393 F.3d 484, 488 (4th Cir. 2005) ("The district court failed to acknowledge the limited scope of *Lapides*.").

Inconsistent rules on jurisdictional questions should not be tolerated. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring) ("Jurisdictional rules should be clear."). This Court should grant review to resolve the circuit conflict and to confirm the general-appearance rule. *See Wisc. Dep't of Corrs. v. Schacht*, 524 U.S. at 395-96 (Kennedy, J., concurring) ("[A]ny appearance the State makes in the federal court may well be regarded as voluntary in the same manner as the appearance[] which gave rise to the waiver[] in *Clark*. . . .").

---

3. Pre-*Lapides* cases are to the same effect from multiple circuits. *E.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d at 356 ("[W]e hold that Florida Prepaid did not waive its Eleventh Amendment immunity through its appearance in this litigation."); *Aerojet-General Corp. v. Askew*, 453 F.2d 819, 828 (5th Cir. 1971) (rejecting a general appearance argument); *Mascheroni v. Bd. of Regents of the Univ. of Cal.*, 28 F.3d 1554, 1560 (10th Cir. 1994) ("[T]he mere fact that the [State] has appeared in this suit, without explicitly invoking Eleventh Amendment immunity, does not, by itself, constitute a waiver of Eleventh Amendment Immunity."), *abrogated on other grounds by Boyer v. Cordant Techs., Inc.*, 316 F.3d 1137, 1140 (10th Cir. 2003).

CONCLUSION

The Ninth Circuit's decision exacerbates two existing conflicts among the circuits and is inconsistent with this Court's prior cases. This Court should grant *certiorari*.

Respectfully submitted,

PAUL W. CANE, JR.
PETER C. MEIER
SEAN D. UNGER*
PAUL, HASTINGS, JANOFSKY
& WALKER LLP[4]
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105-3441
(415) 856-7000

* *Counsel of Record*

Attorneys for Petitioner

4. Counsel acknowledges the assistance of summer associate Sarah O. Chang in preparing this petition.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 25, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-15086

WILLIAM S. AHOLELEI,

Plaintiff-Appellant,

v.

DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII; JOHN F. PEYTON; FRANK LOPEZ; EDWIN SHIMODA; CLAYTON FRANK; RANDY ASHER; ERIC TANAKA; GARY KAPLAN; MAY ANDRADE; CINDA SANDIN; ATTORNEY GENERAL OF THE STATE OF HAWAII,

Defendants-Appellees.

Argued and Submitted
January 10, 2007—San Francisco, California

Filed May 25, 2007

Before: Procter Hug, Jr. And William A. Fletcher, Circuit Judges, And H. Russel Holland,* District Judge.

---

* The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

Appendix A

OPINION

HOLLAND, Judge.

Before us is the sole issue of whether the State of Hawaii Department of Public Safety and ten State officials who are sued in their official capacities ("the State defendants") have waived sovereign immunity as regards appellant William S. Aholelei's state law claims.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's grant of summary judgment on sovereign immunity grounds.

I

In October 2003, appellant William S. Aholelei was beaten by other inmates while incarcerated in a state prison in Hawaii. On July 9, 2004, proceeding *pro se*, Aholelei filed a complaint against the State defendants and others. Here, we are only concerned with Aholelei's state law negligence claims for money damages against the State defendants.

The State defendants asserted sovereign immunity as an affirmative defense to Aholelei's complaint. Subsequently, all defendants moved for leave to file a third-party complaint against the inmates who had attacked Aholelei. The district court granted the defendants' motion, and a third-party complaint was filed on September 23, 2005. The State of Hawaii is expressly named as a third-party plaintiff in the

1. Aholelei's other claims against the State defendants and his claims against the defendants sued in their individual capacities were addressed in a memorandum disposition issued on February 14, 2007. Nothing in this opinion affects that disposition.

third-party complaint. The third-party complaint sought indemnification or contribution from the third-party defendants.

On October 10, 2005, all defendants moved for summary judgment on all claims. The State defendants argued that they were entitled to sovereign immunity on Aholelei's state law claims. Aholelei did not argue that the State defendants had waived their sovereign immunity. At oral argument on the motion for summary judgment, defense counsel told the district court that the third-party complaint would be withdrawn if summary judgment were granted. The district court granted summary judgment in favor of all defendants on all claims. It held that Aholelei's claims for money damages against the State defendants in their official capacities were barred by the Eleventh Amendment. Aholelei timely appealed, and this court appointed counsel for purposes of the appeal.

II

We review questions of sovereign immunity de novo. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). The issue of whether the defendants waived their sovereign immunity was raised for the first time on appeal. As a general rule, we do not consider an issue raised for the first time on appeal, although we have the discretion to do otherwise. *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006). We will exercise our discretion "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Id.* (quoting *Bolker v. C.I.R.*, 760

F.2d 1039, 1042 (9th Cir. 1985)). The issue of whether the State defendants waived their sovereign immunity is purely a legal issue which can be decided on the record that has been developed below. Thus, we will exercise our discretion and consider the waiver issue.

III

[1] The Eleventh Amendment bars suits for money damages in federal court against a state, its agencies, and state officials acting in their official capacities. *See In re Pegasus Gold Corp.*, 394 F.3d 1189, 1195 (9th Cir. 2005); *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992). "Eleventh Amendment immunity is an affirmative defense that must be raised 'early in the proceedings' to provide 'fair warning' to the plaintiff." *Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001) (quoting *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 761 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000)) (internal citation omitted). Because it is an affirmative defense, it can be waived. *Id.* "The test employed to determine whether a state has waived immunity 'is a stringent one.' " *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) (quoting *In rè Mitchell*, 209 F.3d 1111, 1117 (9th Cir. 2000)). "A state generally waives its immunity when it 'voluntarily invokes [federal] jurisdiction or ... makes a 'clear declaration' that it intends to submit itself to [federal] jurisdiction.' " *Id.* (quoting *In re Lazar*, 237 F.3d 967, 976 (9th Cir. 2001)) (alterations in original). "Express waiver is not required; a state 'waive[s] its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.' " *Id.* (quoting *Hill*, 179 F.3d at 758).

[2] Aholelei argues that the State defendants affirmatively invoked federal court jurisdiction by filing the third-party complaint. The issue of whether the filing of a third-party complaint, without more,[2] waives a state's immunity is one of first impression for this circuit.

Aholelei urges us to rely on *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Authority*, 744 F.2d 880 (1st Cir. 1984), as persuasive out-of-circuit authority. There, the defendant argued that it was an instrumentality of the government of Puerto Rico and thus was immune from a suit for damages in federal court. *Id.* at 882. The court rejected the defendant's argument, holding that, if the defendant were a governmental instrumentality entitled to immunity, the defendant had waived its immunity because it "not only appeared but filed a counterclaim and a third-party complaint[.]" *Id.* at 886.

[3] We do not find *Paul N.* persuasive. There, at the time the defendant filed its counterclaim and its third-party complaint, it had not asserted an immunity defense. The defendant raised its immunity defense for the first time on appeal. *Id.* Here, the State defendants raised their immunity defense at the first opportunity, when they answered Aholelei's complaint. Their answer was filed months before they moved for leave to file the third-party complaint. Thus, when the third-party complaint was filed, Aholelei already

---

2. Aholelei also relies on the fact that the defendants filed a witness list. This list was filed on behalf of all the defendants, not just the State defendants, and was filed pursuant to the district court's scheduling and planning order. It is not evidence of an intent by the State defendants to litigate Aholelei's claims on the merits.

had fair warning of the State defendants' assertion of immunity. They then reasserted their immunity defense in their motion for summary judgment.

[4] This is not a case in which the State defendants waited to raise their immunity defense. We have previously found that, in some circumstances, waiting to raise an immunity defense results in a waiver of immunity. *See Hill*, 179 F.3d at 756 (state defendant waived immunity "by participating in extensive pre-trial activities and waiting until the first day of trial" to raise immunity defense); *Bliemeister*, 296 F.3d at 862 (state defendant waived immunity defense by failing to raise it in answer, motion for summary judgment, or at oral argument at which court announced preliminary view of case which was adverse to state defendant). There has been no delay in this case. The State defendants raised their immunity defense in answering and reasserted that defense on motion for summary judgment.

The State defendants urge us to rely on *Skelton v. Henry*, 390 F.3d 614 (8th Cir. 2004), as persuasive out-of-circuit authority. There, the defendants asserted their immunity in their answer to the plaintiffs' amended complaint and included a counterclaim and a third-party complaint in the same document. *Id.* at 617. The plaintiffs argued that the defendants had waived their immunity because they filed a counterclaim and a third-party complaint. *Id.* at 618. The court held "that a counterclaim and third party complaint are not sufficient to waive a claim of Eleventh Amendment immunity asserted in the very same document." *Id.* The court reasoned that "[a] state is not required to give up other valid defenses in order to preserve its immunity defense." *Id.*

Unlike the defendants in *Skelton*, the State defendants in this case did not assert their immunity in the same document in which they asserted their third-party claims. This is, however, a distinction without a difference. The State defendants in this case promptly asserted immunity in their answer and never expressly abandoned this defense, although they subsequently also brought the third-party complaint. The focus of our inquiry here is whether the State defendants' assertion of the third-party claims was incompatible with an intent to preserve their immunity.

[5] We reject Aholelei's contention that the filing of a third-party complaint by the State defendants constituted an invocation of federal jurisdiction which was incompatible with an intent to preserve the defense of sovereign immunity. The filing of the third-party complaint for indemnification or contribution can best be viewed as an appropriate defense strategy, that is, as a contingent claim asserted against third parties. If the district court did not find that the State defendants were entitled to sovereign immunity or otherwise find for the defendants on Aholelei's claims, then the third-party complaint put all of the defendants in a position to seek contribution from joint tortfeasors. If the district court found that the State defendants had sovereign immunity, then their third-party claims became moot, and in fact, the State defendants withdrew their third-party claims once the district court granted them summary judgment. State defendants, like other defendants, are allowed to assert legitimate alternative defenses. *See* Fed. R. Civ. P. 8(e)(2). We have "held that '[i]n light of the liberal pleading policy embodied in Rule 8(e)(2) . . . a pleading should not be construed as an admission against another alternative or inconsistent pleading in the

same case.' " *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1990) (quoting *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir. 1985)) (alterations in original). By filing the third-party complaint, the State defendants did not give up the immunity defense that they had already pleaded. The alternative pleading of a defensive claim against other tortfeasors is not an invocation of federal jurisdiction that is incompatible with an intent to preserve the State defendants' claim of sovereign immunity.

The State defendants did not choose to be in federal court. They were brought into federal court by Aholelei. Their defense posture was not inconsistent nor in conflict with the assertion of sovereign immunity as a primary defense. Aholelei and the district court were on notice that the State defendants were asserting sovereign immunity. The State defendants were not attempting to gain an unfair advantage by pleading in the alternative. Here, we are not faced with an unfair use of an immunity defense, as was the case in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002).

In *Lapides*, Georgia removed the plaintiff's case to federal court. *Id.* at 616, 122 S.Ct. 1640. While conceding that it had waived its sovereign immunity as to the plaintiff's state law claims in state court, Georgia nonetheless argued that it remained immune as to those claims in federal court. *Id.* at 616-17, 122 S.Ct. 1640. The Court held that Georgia had waived its immunity by removing the case to federal court because in doing so it voluntarily invoked the federal court's jurisdiction. *Id.* at 624, 122 S.Ct. 1640. The Court

reasoned that it would be inconsistent to allow a State to invoke federal court jurisdiction in order to remove a case but then allow the State to deny federal court jurisdiction once the case was removed. *Id.* at 619-20, 122 S.Ct. 1640.

Unlike Georgia, the State defendants in this case did not voluntarily invoke federal jurisdiction in order to get their claims before the district court. They were already in federal court because Aholelei had filed suit against them in federal court. They filed the third-party complaint as a defensive move to protect themselves should their immunity defense fail. Pleading in the alternative is not an unfair litigation tactic. Aholelei and the district court had fair warning that the State defendants were asserting an immunity defense, and the State defendants did not engage in any conduct during the course of this litigation that manifested an intent to waive that defense.

IV

[6] We hold that the State defendants did not waive their sovereign immunity by filing the third-party complaint because they had timely asserted immunity prior to filing the third-party complaint and the third-party complaint was a defensive move which was not incompatible with an intent to preserve sovereign immunity. We therefore AFFIRM the district court's grant of summary judgment in favor of the State defendants on sovereign immunity grounds.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 14, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-15086

WILLIAM S. AHOLELEI,

Plaintiff-Appellant,

v.

STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY, et al.,

Defendants-Appellees.

Argued and Submitted January 10, 2007
San Francisco, California

MEMORANDUM*

Before: HUG and W. FLETCHER, Circuit Judges, and HOLLAND**, District Judge.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

Appendix B

William S. Aholelei appeals the district court's summary judgment in favor of the defendants in his 42 U.S.C. § 1983 action, in which he alleged that the defendants had violated his Eighth Amendment rights by failing to protect him from harm while he was incarcerated. Aholelei contends that the district court erred in granting summary judgment on sovereign immunity, mootness, and qualified immunity grounds.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, vacate in part, and remand.

The district court did not err in granting summary judgment on Aholelei's claims for monetary damages against the State and the individual defendants in their official capacities, although we affirm for a reason other than sovereign immunity. *See Welch v. Fritz*, 909 F.2d 1330, 1331 (9th Cir. 1990) (court may affirm on any ground supported by the record). Because "[a] state and its officials acting in their official capacities are not considered 'persons' within the meaning of § 1983," they cannot be held liable under the statute for money damages. *Bank of Lake Tahoe v. Bank of Amer.*, 318 F.3d 914, 918 (9th Cir. 2003) (citing *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 617, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002)). Thus, Aholelei did not have any viable claims for monetary relief against the State and the individual defendants in their official

1. The district court also granted summary judgment to the individual defendants in their individual capacities on a failure to state a claim for relief theory because Aholelei had failed to make out a constitutional violation. Although Aholelei does not expressly challenge this holding by the district court, the qualified immunity issue encompasses the question of whether there has been any violation of Aholelei's constitutional rights.

capacities, irrespective of whether the state and the individual defendants in their official capacities did or did not lose their sovereign immunity by bringing third-party defendants into this case.

The district court also did not err in granting summary judgment on Aholelei's claims for injunctive relief. Aholelei is now on parole. "An inmate's release from prison while his claims are pending generally will moot any claims for injunctive relief relating to the prison's policies...." *Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995). There is no reason to depart from this general rule in this case.

The district court reached only the first inquiry in the qualified immunity analysis, concluding that there had been no violation of Aholelei's Eighth Amendment rights. *See Dias v. Elique*, 436 F.3d 1125, 1131 (9th Cir. 2006) ("[W]e must first evaluate whether, taking the facts in the light most favorable to the non-moving parties and drawing inferences in their favor, those facts establish that the official's conduct violated a constitutional right."). Insofar as the district court treated "advance notification [as] a necessary element of an Eighth Amendment failure-to-protect claim," this was in error, and we remand for reconsideration consistent with the Supreme Court's holdings in *Farmer v. Brennan*, 511 U.S. 825, 848, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

In its evaluation of whether there had been a constitutional violation, the district court did not consider any of Aholelei's evidence, which consisted primarily of litigation and administrative documents involving another prisoner and letters from other prisoners. Although much of

the evidence was presented in an inadmissible form, the contents of the evidence would be admissible at trial if the other inmates were called as witnesses. *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) ("At the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents."). Thus, the district court abused its discretion in excluding Aholelei's evidence from its consideration of whether his constitutional rights had been violated. Although our review is *de novo, see Motley v. Parks*, 383 F.3d 1058, 1062 (9th Cir. 2004), we remand to the district court to allow it to consider Aholelei's evidence in the first instance. Because we are remanding the qualified immunity question, Aholelei's motion to take judicial notice is denied. We leave it to the district court to decide whether the record in this case should be re-opened for the submission of additional evidence.

In sum, we affirm the grant of summary judgment on Aholelei's claims for monetary damages against the State and the individual defendants in their official capacities and on Aholelei's claims for injunctive relief. We vacate the grant of summary judgment to the individual defendants in their individual capacities under both the failure to state a claim for relief theory and the qualified immunity theory and remand to the district court with instructions to consider Aholelei's evidence in evaluating whether there has been any violation of his constitutional rights.

Appendix B

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX C — ORDER GRANTING DEFENDANTS' AND THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII FILED DECEMBER 6, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIV. NO. 04-00414 SOM-KSC

WILLIAM S. AHOLELEI,

Plaintiff,

vs.

STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' AND THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This is a case in which the law unfortunately does not give an injured plaintiff the remedy he seeks. If his injury is to be redressed, it must be in a different forum, or on a different record.

Appendix C

Before the court is a Motion for Summary Judgment ("Motion") filed by Defendants and Third-Party Plaintiffs State of Hawaii Department of Public Safety ("DPS"), John Peyton, Frank Lopez, Edwin Shimoda, Clayton Frank, Randy Asher, Eric Tanaka, Gary Kaplan, May Andrade, Cinda Sandin, and the State of Hawaii Attorney General (collectively "Defendants").

A hearing on the Motion was held on December 5, 2005. Deputy Attorney General John M. Cregor Jr. appeared on behalf of Defendants. Plaintiff William S. Aholelei, an inmate proceeding *pro se,* appeared at the hearing by telephone. The court GRANTS Defendants' Motion for the reasons set forth below.

BACKGROUND

Aholelei filed this civil rights complaint on July 9, 2004, alleging that Defendants failed to protect him from harm when they housed him with known gang members. According to the Complaint, in March or April 2002, Aholelei was transferred to Halawa Correctional Facility ("HCF") "Module-2, A-block, Quad-2." (Compl. Stmt. of Facts 1.) Within a few days, Aholelei realized that he had been housed with prison gang members. Aholelei says, "These sep[a]rated gang members seemed to have no problem with me, even though I am not a gang-member, so long as I obide [sic] by their rules." (*Id.*) Aholelei says that he went along with the prison gang members' rules and was safe for the next year and a half, until October 3, 2003. (*Id.* 1-2.)

Appendix C

Aholelei says that, on or about October 3, 2003, he took a place in the front of the prison lunch line. A gang member approached Aholelei and told him that he was not allowed to lead the lunch line, as this privilege was reserved for gang members. At this point, Aholelei says, he realized that he might have angered these gang members, and he sought a meeting with them to apologize and erase any ill-feelings he might have caused. When Aholelei arrived at the cell where the meeting was to take place, he was allegedly attacked and severely beaten by several gang-members, leaving him with permanent, serious injury. Aholelei spent six days in a coma at the Queen's Medical Center following the attack. He later returned to HCF, where he was first housed in the medical unit, and then in protective custody. Aholelei was then transferred from HCF to Waiawa Correctional Facility ("WCF"). He is now incarcerated at Oahu Community Correctional Center ("OCCC").

Aholelei alleges that Defendants are liable for his injuries because they knew, or should have known, of the dangers inherent in housing gang members and non-gang members together, as inmates belonging to rival gangs were separated. Aholelei believes that his assault was the result of the DPS's allegedly unconstitutional policies and procedures allowing known gang members at HCF to be housed with non-gang members. Aholelei seeks $4 million in damages. He also seeks declaratory and injunctive relief requiring Defendants to cease housing non-gang members with known gang members, to "create a deterrent to prison gang membership," and to reduce the prison population to an "acceptable level to be determined by a U.S. Judge." (Compl. at "Relief.")

Appendix C

LEGAL STANDARD

Summary judgment shall be granted when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *see also Porter v. Cal. Dep't of Corr.*, 383 F.3d 1018, 1024 (9th Cir. 2004); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323. A moving party without the ultimate burden of persuasion at trial—usually, but not always the defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The moving party must identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.*, 477 U.S. at 323).

Appendix C

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote omitted). The nonmoving party may not rely on the mere allegations in the pleadings and instead "must set forth specific facts showing that there is a genuine issue for trial." *Porter*, 383 F.3d at 1024 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). "A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *California v. Campbell*, 319 F.3d 1161, 1166 (9th Cir. 2003); *Addisu*, 198 F.3d at 1134 (stating "[t]here must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion").

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv.*, 809 F.2d at 631. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter*, 338 F.3d at 1024. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage. *Id.* However, inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 631.

Although Defendants style this motion as a summary judgment motion, the portion of the motion based on

Appendix C

Eleventh Amendment immunity is more accurately viewed as a motion to dismiss for lack of subject matter jurisdiction, under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Under the Eleventh Amendment, a state is immune from certain actions brought in federal court by her own citizens or citizens of other states. *Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Pennhurst State Sch. & Hasp. v. Halderman*, 465 U.S. 89, 100, 106 (1984); *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1989).

There has been much confusion over whether Eleventh Amendment immunity is a component of the court's subject matter jurisdiction. The Supreme Court has stated that the "fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue; 'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar' that it may be raised at any point of the proceedings." *Fla. Dept. of State v. Treasure Salvors*, 458 U.S. 670, 683 n.18 (1982) (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)). The Ninth Circuit has similarly stated that "Eleventh Amendment sovereign immunity limits the jurisdiction of the federal courts and can be raised by a party at any time during judicial proceedings or by the court *sua sponte*." *Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1048 (9th Cir. 1999); *see also Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998); *Charley's Taxi Radio Dispach v. Sida of Haw.*, 810 F.2d 869, 873 n.2 (9th Cir. 1987).

Other appellate decisions, however, have noted that sovereign immunity may be waived. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S.

666, 675 (1991); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760, *as amended*, 201 F.3d 1186 (9th Cir. 1999); *ITSI TV Prods., Inc. v. Agric. Assocs.*, 3 F.3d 1289, 1291-92 (9th Cir. 1993). Under this line of cases, Eleventh Amendment immunity is treated as an affirmative defense that the agency claiming immunity has the burden of demonstrating. *ITSI*, 3 F.3d at 1291-92.

The Ninth Circuit has attempted to reconcile these apparently conflicting cases, calling states' Eleventh Amendment immunity "quasi-jurisdictional." *Bliemeister v. Bliemeister (In re Bliemeister)*, 296 F.3d 858, 861 (9th Cir. 2002). Under *Bliemeister*, sovereign immunity "may be forfeited where the state fails to assert it and therefore may be viewed as an affirmative defense." *Id.* In the present motion, Defendants assert Eleventh Amendment immunity. No matter how that immunity is characterized, Eleventh Amendment immunity bars Aholelei's claims against all Defendants in their official capacities.

DISCUSSION

Defendants assert five grounds in support of their Motion: (1) Aholelei fails to state a claim under the Eighth Amendment; (2) Defendants are entitled to Eleventh Amendment immunity; (3) the State of Hawaii and its employees, while acting in their official capacities, are not "persons" within the meaning of 42 U.S.C. § 1983; (3) there is no respondeat superior liability under 42 U.S.C. § 1983, and the individuals named as Defendants were not personally involved in the actions and events giving rise to Aholelei's claims; and (5) Defendants are entitled to qualified immunity in their individual capacities.

Aholelei counters simply that he is alleging that Defendants failed to protect him from other inmates while he was incarcerated at HCF. Aholelei asserts that Defendants' failure to protect him stems directly from the DPS's official policy and practice, utilized at HCF, of separating rival gang members from each other while housing non-gang members with the separated rival gangs.

I. Official Defendants Have Immunity Under the Eleventh Amendment.

"The Eleventh Amendment prohibits federal courts from hearing suits brought against an unconsenting state." *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053 (9th Cir. 1991) (citation omitted); *see also Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 267-68 (1997). The Eleventh Amendment also bars damage actions against state officials in their official capacities. *See Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997). The Eleventh Amendment bars suit against state agencies as well as suits naming the state itself. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *see also Lucas v. Dep't. of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam) (stating that the Board of Corrections is an agency entitled to absolute immunity); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (concluding that the Nevada Department of Prisons is a state agency entitled to Eleventh Amendment immunity). The Eleventh Amendment, however, does not bar suits against state officials for prospective declaratory or injunctive relief. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-06 (1997); *Lawrence Livermore Nat'l Lab.*, 131 F.3d at 839.

Appendix C

Defendants, as State of Hawaii agencies or employees, are immune from suit for damages in their official capacities. Defendants' motion for summary judgment on Aholelei's claims against them in their official capacities for monetary damages is GRANTED.

II. This Court Lacks Jurisdiction Over Aholelei's Claims for Injunctive Relief.

Aholelei has now been transferred to OCCC. It is unclear if the contested DPS policy of separating rival gang members from each other while housing non-gang members with the separated gang members is in effect at OCCC. Nonetheless, Aholelei's transfer to OCCC renders moot his claims for injunctive relief seeking to overturn or modify DPS's housing policy as it relates to the housing of gang members with non-gang members at HCF. *Kasza v. Browner*, 133 F.3d 1159, 1172 (9th Cir. 1998) ("A case is moot when the controversy isn't live any longer."); *American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118, 1123-24 (9th Cir. 1997); *see also Darring v. Kincheloe*, 783 F.2d 874, 876-77 (9th Cir. 1986) (holding that when an inmate has been transferred to another prison, there is no reasonable expectation that he will again be subjected to the prison conditions he seeks to enjoin). Nor does Aholelei have standing to assert the rights of inmates still housed at HCF. *See Jackson v. Official Representatives and Employees of Los Angeles Police Dep't*, 487 F.2d 885, 886 (9th Cir. 1973)).

This court lacks jurisdiction to entertain Aholelei's claims against Defendants for injunctive relief with respect to the DPS's allegedly unconstitutional housing policy at HCF. Accordingly, Aholelei's claims against Defendants for

injunctive relief relating to HCF's gang member housing policy are hereby DISMISSED.

III. Individual Defendants Are Not Personally Liable.

Defendants Peyton, Lopez, Shimoda, Frank, Asher, Tanaka, Kaplan, Andrade, Sandin, and the Attorney General argue that Aholelei has failed to state a claim against them in their individual capacities under the Eighth Amendment, and that summary judgment should be granted on this basis.

In support of their Motion, Defendants provide the sworn declaration of Gary Kaplan, DPS Corrections Supervisor II. (*See* Defs. Concise Stmt. of Facts, Ex. B. Kaplan Dec.) Kaplan states that he has been responsible for virtually all housing assignments at HCF since August 2003. (Kaplan Dec. ¶ 4.) Kaplan says that Aholelei's initial housing assignment at HCF was "routinely made following his initial processing and classification" although Kaplan does not identify who actually made Aholelei's housing assignment. (*Id.* ¶ 5.) Kaplan avers that Defendants Peyton, Lopez, and Shimoda were never involved in the housing assignments of Aholelei or any other inmate.[1] (*Id.* ¶¶ 3, 6.) Kaplan further states that Defendants Frank, Asher, and Tanaka were rarely involved in inmate housing assignments, and were not involved in Aholelei's housing assignment.[2] (*Id.*) Similarly,

1. Peyton is the past DPS Director, Lopez is the past DPS Deputy Director and present interim DPS Director, and Shimoda is the DPS Institutions Division Administrator. (Kaplan Dec. ¶ 3.)

2. During the time at issue, Frank was HCF Warden, and Asher and Tanaka were HCF Deputy Wardens. (Kaplan Dec. ¶ 3.) Kaplan (Cont'd)

Kaplan avers that Defendants Andrade and Sandin had no involvement in Aholelei's housing assignment.[3] (*Id.*)

Kaplan says that it has been HCF prison officials' experience that housing rival gang members together leads to increased violence at the prison. (*Id.* ¶ 9.) Accordingly, it is HCF's policy to separate rival gangs from each other when making housing assignments. (*Id.*) Kaplan asserts, however, that it has also been their experience that once rival gangs are separated from each other, the separated gang members are no more violent than the prison population in general. (*Id.* ¶ 10.) It is Kaplan's "personal and professional policy never to knowingly place a prisoner in a housing assignment that would place him in an increased risk of harm." (*Id.* ¶ 11.)

Finally, Kaplan states that Aholelei did not, before he was assaulted, alert any prison official that he was afraid of being housed with gang members, or that he believed he might be attacked by prison gang members that he had inadvertently offended. (*Id.* ¶¶ 7, 8, 12.) Kaplan says that

---

(Cont'd)

states that although the Warden does have the final authority in inmate housing, neither Frank, Tanaka, nor Asher exercised that authority in Aholelei's case. (*Id.*)

3. Kaplan states that Andrade was, at all times material to Aholelei's Complaint, Chief of Security at HCF. He states that Sandin, who is the HCF Corrections Supervisor II at the HCF Special Needs Facility, is involved in housing assignments at the HCF Special Needs Facility, but was not involved in Aholelei's housing assignment. (Kaplan Dec. ¶ 3.)

during the entire year and a half that Aholelei was housed with gang members before he was assaulted, Aholelei never complained, in person or by grievance, to any prison official of his fear for his safety. (*Id.*)

Aholelei's Opposition does not specifically dispute Kaplan's statements regarding who was responsible for his housing assignment or regarding Aholelei's failure to notify Defendants of his general or specific fears for his safety. Aholelei instead argues again that his claims concern Defendants' alleged failure to protect him. Aholelei contends that a "reasonable man of average intelligence" would see that the prison's policy of separating rival gang members, while housing non-gang members with the separated gang members, "is an obvious danger to prisoners."[4] (Op. ¶ 67.) Aholelei asserts that although he was able to "precariously co-exist with sep[a]rated concentrated gang members" this does not negate the fact that his living conditions were always "uncertain and dangerously insecure." (*Id.* ¶ 68.)

At the hearing on the present Motion, Aholelei said that he had orally communicated his fear to a prison guard and other prison officials, but his statement is not corroborated by a declaration or other evidence. Under these circumstances, the court cannot consider this statement. Even if the court were inclined to allow Aholelei to supplement

---

4. Aholelei appears to be indirectly asserting that Defendants are liable for his injuries because they were either responsible for the contested DPS housing policy, or were aware of the policy and its alleged inherent dangers, and did nothing to change the policy. He does not, however, make this argument explicit in his Complaint or Opposition.

the record, his assertion would be insufficient to defeat summary judgment, as he fails to specify in any meaningful way to whom or when the alleged oral communications were made.

The Eighth Amendment's prohibition against cruel and unusual punishment requires that prison officials take reasonable measures for the safety of inmates. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). In particular, officials have a duty to protect inmates from violence at the hands of other inmates. *Id.* at 833. A prison official violates the Eighth Amendment only when two requirements are met: (1) the deprivation alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent to the inmate's safety. *Id.* at 834.

To be liable for failure to prevent harm, a prison official must know of and disregard an excessive risk to inmate safety. *Id.* at 837. The official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *See id.* A prison official need not "believe to a moral certainty that one inmate intends to attack another at a given place at a time certain before [he] is obligated to take steps to prevent such an assault." *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Before being required to take action a prison official must, however, have more than a "mere suspicion" that an attack will occur. *Id.* at 459-60 (summary judgment was appropriate when the plaintiff "failed to come forward with any facts showing that these defendants had any reason to believe he would be attacked by the assailant").

Appendix C

When, as here, an inmate is seeking damages against a defendant, the "inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy,* 844 F.2d 628, 633 (9th Cir. 1988). *Leer* explained that "it is important to distinguish the causal connection required when a plaintiff seeks injunctive or declaratory relief as opposed to damages." *Id.* When a plaintiff seeks injunctive or declaratory relief a broader, more generalized approach to causation is taken. *See id.* When a plaintiff, however, seeks to hold an individual defendant personally liable for damages, the causation inquiry between the deliberate indifference and the alleged Eighth Amendment deprivation is more refined:

> [The court] must focus on whether the individual defendant was in a position to take steps to avert the [harm], but failed to do so intentionally or with deliberate indifference. In order to resolve this causation issue, [the court] must take a very individualized approach which accounts for the duties, discretion, and means of each defendant. . . . Sweeping conclusory allegations will not suffice to prevent summary judgment. . . . The prisoner must set forth specific facts as to each individual defendant's deliberate indifference.

Id. at 633-34 (citations omitted).

The only admissible evidence the court has indicates that Aholelei never alerted anyone at the prison of his fears for

his safety during the year and a half before the assault. During that year and a half, Aholelei existed without incident with gang members. Nor does the court have admissible evidence that Aholelei communicated his fears on the day of the assault, when he says he unwittingly insulted a gang member and then sought a private meeting with the gang to apologize and avoid an attack.

Aholelei did file grievances while he was housed with the gang members who later assaulted him. But his grievances, which sought a transfer to a minimum security facility, were based on his belief that his classification status justified a minimum custody placement. (*See* Op. Exhs. B-A, B-B, Grievance Nos. 86833 and 92759.) The grievances did not claim or even suggest that Aholelei was concerned for his safety because he was housed with gang members. In fact, Aholelei admits that "[a]s long as [he] went along with their rules, [he] was safe[,]" suggesting that he was not afraid for his safety until the day of the attack. (Compl. Stmt. of Facts ¶ 6.)

If Aholelei had notified prison officials of his alleged fears, either in the first year and a half that he was at HCF before the attack, or on the day of the attack, when he was concerned enough about his safety to seek help from an inmate intermediary to apologize to the gang member, officials might have been able to prevent the assault. But Aholelei did not notify officials. They had no notice that he had a well-grounded and specific fear of an impending assault. Without this notice, Aholelei cannot show that Defendants were deliberately indifferent to his fear or that they are liable for failing to protect him.

Aholelei seems to be suggesting that the danger to him was obvious. But just saying so does not make that so, and the evidence is to the contrary. Kaplan says that prisoner housing assignments are determined according to the inmates initial processing and classification status. (*See* Kaplan Dec. ¶ 5.) Then, acting from experience, the prison separates similarly classified rival gangs from each other. (*Id.* ¶ 9.) Once rival gangs are separated, similarly classified inmates are housed with the like-classified gang members. The prison's experience was that gang members were then "no more violent than the prison population in general." (*Id.* ¶ 10.) As harsh as it may seem, when Aholelei inadvertently violated an unwritten gang rule on October 3, 2003, it was incumbent on him to notify prison officials of his well-founded fear so that they could protect him from the assault that occurred. Absent such notice, the individual Defendants cannot be said to have intentionally placed Aholelei in harm's way or to have acted with deliberate indifference to his safety. Aholelei has failed to state a claim for a violation under the Eighth Amendment, and Defendants' Motion for Summary Judgment is GRANTED.

IV. Defendants Are Entitled to Qualified Immunity.

The individual Defendants also assert, in the alternative, that they are entitled to qualified immunity. This court agrees.

Saucier v. Katz, 533 U.S. 194 (2001), sets forth a two-step inquiry for determining whether qualified immunity applies. First, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged [must] show [that] the officer's conduct violated a constitutional right." *Id.* at 201. This prong of the *Saucier* inquiry "mirrors the

substantive summary judgment decision on the merits." *Sorrels v. McKee,* 290 F.3d 965, 969 (9th Cir. 2002). "If no constitutional right would have been violated were the allegations established," the inquiry ends. *Saucier,* 533 U.S. at 201. If there appears to have been a constitutional violation, however, the second step is to determine whether the right in question was "clearly established . . . in light of the specific context of the case, not as a broad general proposition." *Id.; Walker v. Gomez,* 370 F.3d 969, 974 (9th Cir. 2004).

As detailed above, the facts alleged do not show that the individual Defendants violated Aholelei's constitutional right to be free from cruel and unusual punishment by their failure to protect him from the assault at issue here. *See Saucier,* 533 U.S. at 201. Aholelei does not escape these facts by alleging that the housing policy he lived with at HCF is unconstitutional, and that he has a right to be housed only with non-gang members.

"Prisons are inherently dangerous institutions, and decisions concerning safety, order, and discipline must be, and always have been left to the sound discretion of prison administrators." *Lewis v. Casey,* 518 U.S. 343, 391 (1996); *Johnson v. California,* __ U.S. __, 125 S. Ct. 1141, 1152 (2005). "[M]aintaining institutional security and preserving internal order and discipline" are the central goals of prison administration. *Bell v. Wolfish,* 441 U.S. 520, 546 (1979). Inmate housing assignments are basic security decisions best left to the sound discretion of prison authorities.

Aholelei does not have a constitutional right to be housed only with non-gang members, in the prison of his choice, or

in a specific area of the prison. *See Meachum v. Fano*, 427 U.S. 215, 224 (1976) (no right to a particular institution); *Olim v. Wakinekona*, 461 U.S. 238, 244-45 (1983) (no right to a particular state); *Grayson v. Rison*, 945 F.2d 1064, 1067 (9th Cir. 1991) (no right to less restrictive facility). There is simply no constitutional principle forbidding prisons from housing gang members with non-gang members. Thus, Aholelei's allegations do not make out a constitutional violation, and the individual Defendants have qualified immunity.

CONCLUSION

Defendants are entitled to Eleventh Amendment immunity from suit in their official capacities. Because Aholelei has been transferred, the court lacks jurisdiction over his claims seeking injunctive relief with respect to what is occurring at HCF, and those claims are dismissed. Aholelei has failed to show that the individual Defendants acted with deliberate indifference with respect to his safety, and there is no genuine issue of material fact relating to any alleged Eighth Amendment violation. Moreover, the individual Defendants are also entitled to qualified immunity, given Aholelei's failure to make out a constitutional violation, even assuming his factual allegations are true. Defendants' Motion for Summary Judgment is GRANTED.

Defendants have stated that they will withdraw their Third-Party Complaint if they are granted summary judgment against Aholelei. The Third-Party Complaint is therefore deemed withdrawn, and Third-Party Defendant Stanley Canosa's pending motion for summary judgment is rendered moot.

Appendix C

The Clerk is directed to enter judgment in favor of Defendants and to close this case.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, December 6, 2005.

s/ Susan Oki Mollway
SUSAN OKI MOLLWAY
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER GRANTING DEFENDANTS' MOTION FOR LEAVE TO FILE THIRD-PARTY COMPLAINT; DENYING PLAINTIFF'S MOTION FOR COPIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII FILED SEPTEMBER 15, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

CIV. NO. 04-00414 SOM-KSC

WILLIAM S. AHOLELEI,

Plaintiff,

vs.

STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR LEAVE TO FILE THIRD-PARTY COMPLAINT; DENYING PLAINTIFF'S MOTION FOR COPIES

Before the court is Defendants State of Hawaii, Department of Public Safety ("DPS"), John Peyton, Frank Lopez, Edwin Shimoda, Clayton Frank, Randy Asher, Eric Tanaka, Gary Kaplan, May Andrade, Cinda Sandin, and State of Hawaii Attorney General's ("Defendants"), Motion for Leave to File Third-Party Complaint, filed on August 2, 2005. Plaintiff William S. Aholelei, an inmate proceeding pro se,

filed his Memorandum in Opposition to Defendants' Motion for Leave to File Third-Party Complaint on August 30, 2005. Aholelei has also filed a Motion for Copies.

This matter came on for hearing on September 15, 2005. Deputy Attorney General John M. Cregor Jr. appeared on behalf of Defendants. Mr. Aholelei appeared at the hearing by telephone. After careful consideration of the motion, supporting and opposing memoranda, and the arguments of the parties, this court GRANTS Defendants' Motion for Leave to File Third-Party Complaint for the reasons set forth below. The court DENIES Aholelei's Motion for Copies.

BACKGROUND

Aholelei filed this 42 U.S.C. § 1983 civil rights complaint on July 9, 2004, alleging that Defendants, acting under color of state law, failed to protect him from harm when they housed him with known gang members. Aholelei states that he was severely beaten by several inmate gang members while he was incarcerated at Halawa Correctional Facility, resulting in permanent, serious injury. Aholelei alleges that Defendants are liable for his injuries because they knew, or should have known, of the inherent danger in separating inmates belonging to rival gangs from each other, while continuing to house gang members and non-gang members together. Aholelei alleges that his assault was a result of the DPS's policies and procedures allowing known gang members to be housed with non-gang members.

Defendants move to file a Third-Party Complaint naming the inmates who assaulted Aholelei, who have now been

found guilty of assaulting Aholelei by the prison authorities at an internal prison investigation. Defendants seek indemnification or contribution from these other inmates, for the assault against Aholelei.

LEGAL STANDARD

Rule 14 of the Federal Rules of Civil Procedure governs third-party practice. Rule 14(a) provides in pertinent part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. . .

Fed.R.Civ.P. 14(a). Rule 14(a) thus allows joinder of a third party at any time, provided that the third-party plaintiff obtains leave on motion to implead if the third-party plaintiff does not file the third-party complaint within ten days after the defendant serves the original answer. *See Southwest Adm'rs, Inc. v. Rozay's Transfer*, 791 F.2d 769, 777 (9th Cir. 1986). The decision whether to implead a third-party defendant is within the sound discretion of the trial court. *See id.*; *see also United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983).

Appendix D

The purpose behind Rule 14 "is to promote judicial efficiency by eliminating the necessity for the defendant to bring a separate action against a third party who may be derivatively liable to the defendant for all or part of the plaintiff's original claim." *Kim v. Fujikawa*, 871 F.2d 1427, 1434 (9th Cir. 1989) (citation omitted); *see also Southwest Adm'rs*, 791 F.2d at 777.[1] However, "only when the third party's liability is in some way dependent on the outcome of the main claim and—is secondary or derivative thereto" will a court grant leave to file a third-party complaint. *Stewart v. Am. Int'l Oil & Gas Co.*, 845 F.2d 196, 199 (9th Cir. 1988) (citing *One 1977 Mercedes Benz*, 708 F.2d at 452). A third-party claim

> cannot simply be an independent or related claim but must be based upon plaintiff's claim against ;defendant. The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against him by the original plaintiff. The mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough.

---

1. Commentators on Rule 14 have said that when "the rights of all three parties center upon a common factual setting, [the] economies of time and expense can be achieved by combining the suits into one action. Doing so eliminates duplication in the presentation of evidence and increases the likelihood that consistent results will be reached" and limits prejudice to the defendant by removing the time lag between a judgment against the defendant in one action, and a judgment in its favor against the party ultimately liable in a subsequent action. 6 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1442, at 290-91 (1990 ed.).

Id. at 200 (quoting 6 Wright & Miller, *Federal Practice and Procedure* § 1446, at 257 (1971 ed.)); *see also One 1977 Mercedes, Benz,* 708 F.2d at 452 ("It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff's claim").

Among the factors that a court may consider in determining whether to permit the filing of a third-party complaint are: "(i) whether the movant deliberately delayed or was derelict in filing the motion; (ii) whether impleading would unduly delay or complicate the trial; (iii) whether impleading would prejudice the third-party defendant; and (iv) whether the third-party complaint states a claim upon which relief can be granted." *Nova Prods., Inc. v. Kisma Video, Inc.*, 220 F.R.D. 238, 240 (S.D.N.Y. 2004) (citation omitted).

DISCUSSION

I. The Motion for Leave to File Third-Party Complaint is Granted

Here, Defendants sought leave to file the third-party complaint by August 2, 2005, which was the date set by this court for filing such motions. Thus, the Motion was timely filed relatively early in the litigation. Therefore, the first three factors favor allowing the filing of the third-party complaint.

The court turns now to the fourth factor, whether the proposed third-party complaint states a claim upon which relief can be granted. Aholelei contends that the third-party defendants are improper because they cannot be held liable

for his claims against Defendants. In essence, Aholelei argues that he is suing Defendants for their failure to protect him under § 1983, and that he is not alleging any claim for which the third-party defendants can be held liable.[2] Aholelei says his claim seeks to hold Defendants liable under § 1983, for failing to protect him while he was in their care, as a result of Defendants' deliberate indifference and constitutionally deficient policies and procedures.

Notwithstanding these arguments, Aholelei's Complaint clearly alleges state law causes of action, under the Hawaii Constitution, for "negligence and other torts," and for the infliction of emotional distress. *See* Compl. at Fourth, Fifth, and Sixth Causes of Action. Aholelei specifically requests that the court exercise supplemental jurisdiction over his state law claims. *Id.* at 4. Aholelei says in his Opposition that "he was fooled by [the gang members] and they pretended to be my friend and then they try to kill me.... I did not expect[] to be assaulted [sic] by these ... gang members and in that respect I was befriended by them and deceived." Pl. Opp'n at 16. He also states that he intends to introduce at trial police reports, internal Halawa prison disciplinary reports, and any "evidence ... that the prosecuting attorney has that is being used as evidence in the prosecution of the seven (7) prison gang members for the charge of assault or attempted murder on my life[.]" *Id.* at 19. Thus, Aholelei himself intends to bring the assault, and the inmates who beat him, into issue at the trial.

---

2. Aholelei, who is proceeding pro se, has filed a handwritten, single-spaced, twenty-one page Opposition. The court has struggled to liberally construe Aholelei's arguments and believes this is an accurate summary of Aholelei's arguments.

Appendix D

Defendants argue that justice requires that the parties who are actually responsible for the assault against Aholelei should share in the liability for the attack. Defendants further assert that they are entitled to indemnification and/or contribution from the proposed third-party defendants pursuant to Haw. Rev. Stat. § 663-10.5.[3]

To the extent that Defendants may be trying to seek indemnity by way of the third-party complaint based directly on § 1983, the court finds that impleader is improper. First, it is well settled that a private party may only incur § 1983 liability if his actions are carried out "under color of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961). Defendants do not allege that the third-party defendants acted under color of state law. Rather, Defendants allege that the third-party defendants "intentionally, maliciously, negligently, carelessly, recklessly, and/or tortiously caused the injuries and/or damages as alleged" by Aholelei. Proposed Third-Party Compl. ¶ 5. This, without more, is not an action taken under color of state law.

Therefore, the third-party complaint does not state a claim under § 1983 because the third-party defendants cannot be found to have violated § 1983.

---

3. Section 663-10.3 states in relevant part:

> Notwithstanding sections 663-11 to 663-13, 663-16, 663-17, and section 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity.

Moreover, it is not clear that § 1983 itself provides for indemnification. In *Valdez v. City of Farmington*, 580 F. Supp. 19, 21 (D.N.M. 1984), the court noted that "there exists no clear authority on the question of whether a § 1983 defendant may seek indemnity from his co-defendant." In *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), cited in *Valdez*, the Supreme Court made it clear that courts are not free to read a cause of action for indemnity into statutes where no statutory basis exists for such a claim. There, the Court determined that no right to contribution exists among co-defendants under the Equal Pay Act or Title VII. Defendants point to no such basis and the court is unable to find such a basis for indemnification under § 1983. Therefore, any claims for indemnification against the third-party defendants based directly upon § 1983 are impermissible.

Defendants, however, do not seek indemnification under § 1983; they seek indemnification under Haw. Rev. Stat. § 663-10.5. Impleader is proper only when a right to relief exists under the applicable substantive law. *See* 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1446, at 367 (1990 ed.).

Here, state law clearly grants a right to relief pursuant to Haw. Rev. Stat. § 663-10.3. Moreover, the very existence of Aholelei's constitutional claims against Defendants depend on the assault against him, and are closely connected with his underlying physical injuries, and form the basis for his state law claims against Defendants. Aholelei admits that he intends to introduce evidence of the third-party defendants' assault upon him, and subsequent discipline by prison or state

authorities. Finally, Aholelei's Complaint seeks supplemental jurisdiction over his state law claims for negligence and intentional infliction of emotional distress. Thus, impleader is proper for all of these reasons. Nor will allowing the impleader unduly complicate or confuse the issues at trial; it will, in fact, ensure the timely resolution of the claims.

This court, in its discretion, finds that the impleader of the third-party defendants and complaint will avoid "circuity of action and eliminate duplication of suits based on closely related matters." 6 Wright, Miller & Kane, *Federal Practice and Procedure* § 1446, at 300 (1990 ed.). The Motion for Leave to File Third-Party Complaint is GRANTED.

II. The Motion for Copies is Denied.

Aholelei moves the court to provide several copies of his Motion in Opposition and its accompanying exhibits and supplemental memoranda, comprising approximately 120 pages, free of charge, so that he may serve his Opposition on Defendants, give the required extra copy to the court, and retain a copy for his own records. Aholelei states that the Waiawa Community Correctional Center's copy machine is out of order and he has, thus, been unable to send a copy of his Opposition to the Motion to Defendants.[4]

At the hearing, Cregor informed the court that the Waiawa Correctional Facility's copy machine is, in fact,

4. Aholelei included a certificate of service with his Opposition, suggesting that he had, in fact, served Defendants. Prior to the hearing on the motion, Defendants informed the court that they did not receive a copy of Aholelei's Opposition.

broken. Cregor represented that there is a system in place, however, that ensures that inmates may have their documents copied, upon their request. Cregor stated that Aholelei knew of this system, as he has had copies made in the past. Aholelei agreed that he was aware of that process, but argued that it wasn't "for all inmates." The court is unsure what the significance of this statement is, as Aholelei did not explain it further.

The court has provided Defendants a courtesy copy of Aholelei's Motion and documents so as not to delay the hearing on this matter. The court will not, however, provide copies free of charge to any litigant, even those proceeding in forma pauperis. *See Tedder v. Odel,* 890 F.2d 210, 211 (9th Cir. 1989) (stating that 28 U.S.C. § 1915(a) does not waive payment for costs of litigation other than filing of the complaint and service of process). Aholelei admits that he is aware of the process he must follow to make copies and that he has utilized this system in the past. If Aholelei is unable to make copies of his legal documents in the future at Waiawa, the costs for which are deducted from his inmate account, he may provide the court with documentation from the prison authorities averring that this is the case. The court will then consider a Motion for Copies. Until that time, the Motion for Copies is DENIED.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, September 15, 2005.

s/ Kevin S. Chang
Kevin S. Chang
UNITED STATES MAGISTRATE JUDGE